PD-0478-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/11/2019 1:12 PM
Accepted 12/11/2019 2:16 PM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
12/11/2019
DEANA WILLIAMSON, CLERK

Cause No. PD-0478-19

In the Court of Criminal Appeals
for
The State of Texas

Ex parte Leonardo Nuncio

Arising from Cause No. 04-18-00127-CR
in the Fourth Court of Appeals in
San Antonio, Texas

Petitioner's Reply Brief

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Oral argument is again requested.

Table of Contents

Index of Authorities

CASES

STATUTES

OTHER AUTHORITIES

RULES

To the Court of Criminal Appeals:

Petitioner Leonardo Nuncio makes this reply to the State's brief:

Argument

1. Overbreadth is before this Court.

This court reviews "decisions"[1] of courts of appeals. The decision of the court below—as the State admits in its brief[2]—addressed overbreadth.[3]

The State wrongly suggests that "appellant never applies the overbreadth test."[4] Mr. Nuncio applies the test in section 2 of his brief before this Court.

2. Overbreadth analysis is a special case of strict-scrutiny analysis.

The State attempts to distinguish between "strict scrutiny" and "overbreadth."[5]

The short rhetorical-question response to this distinction is: *How can a restriction be both "substantially overbroad" and "narrowly tailored"?*

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[1] Tex. R. App. Proc. 66.1.

[2] *See State's Brief* 9-10

[3] *Opinion Below* *4–*9.

[4] *State's Brief* 11

[5] *State's Brief* 5.

The longer, more analytical, response is that overbreadth analysis is a special case of strict-scrutiny analysis. While a statute may pass overbreadth and fail strict scrutiny, it is not possible for a statute to fail overbreadth and pass strict scrutiny.

A restriction on speech fails overbreadth analysis if it restricts a real and substantial amount of protected speech, judged in relation to its legitimate sweep. This analysis applies only to content-based restrictions on speech.[6]

Strict scrutiny, which in the First Amendment context also applies only to content-based restrictions,[7] has two components, both of which must be satisifed for the restriction to pass:

- A compelling state interest; and

[6] "[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." *Schall v. Martin*, 467 U.S. 253, 268 (1984). As to the analysis applying only to *content-based* restrictions, in a nutshell, a restriction on speech is either content neutral or content based. If it is content neutral it does not distinguish between protected and unprotected speech, so it *by definition* restricts a real and substantial amount of protected speech, but this does not invalidate it. Therefore overbreadth analysis cannot apply to it.

[7] *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 791 (1994) (Scalia, J., concurring in part and dissenting in part) (strict scrutiny is demanded for content-based regulation of speech).

- Narrow tailoring to satisfy that interest.[8]

If there is a compelling state interest, but the statute is not narrowly tailored to satisfy it, the statute fails strict scrutiny.[9]

If the statute is narrowly tailored to satisfy some state interest, but the state interest is not compelling, the statute fails strict scrutiny.

In the context of a content-based restriction on speech, overbreadth analysis applies specific definitions to both of these components. First it recognizes that there is a compelling state interest in restricting, based on its content, speech in certain categories—*Stevens*'s recognized categories of historically unprotected speech. It is not necessary for courts to revisit whether the state has a compelling interest in restricting child pornography or true threats or incitement;[10] if a statute restricts speech only in these categories it is *ipso facto* narrowly tailored.

Overbreadth analysis further recognizes that the government's compelling interest in restricting speech based on its content applies

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[8] *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014).

[9] A government's purpose is not relevant when a law is content based on its face. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015).

[10] This is not to say that there will not in the future be challenges to these or other categories.

only to speech in those recognized categories of historically unprotected speech.[11]

If the content-based statute restricts some speech outside of those categories, it may still be narrowly tailored. In overbreadth analysis, *narrowly tailored* means "does not restrict a *substantial amount* of protected speech in relation to the historically unprotected speech that it restricts." If it does, it is overbroad,[12] and void.

In short, under overbreadth analysis all possible *compelling state interests* for restricting content are encompassed by a few narrow categories of unprotected speech, and if a content-based restriction restricts a substantial amount of speech outside of those categories—protected speech—it fails strict scrutiny because it is not *narrowly tailored* to satisfy any of those compelling state interests.

It is, in other words, *facially overbroad*.

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[11] "From 1791 to the present, … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal edits and quotations omitted).

[12] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).

This is the "second type of facial challenge" recognized by the Court, "whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" [13]

2.1. Overbreadth has only been applied in free-speech cases.

It makes no sense to say that "the overbreadth doctrine does not concern itself with whether a statute is 'content[ ]based'."[14]

Whether a restriction is content based is the threshold question for the application of First Amendment overbreadth.[15] It is also, not coincidentally, the threshold question for the application of strict

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[13] *United States v. Stevens*, 559 U.S. at 473 (internal quotations omitted). The first type of facial challenge, outside the First Amendment context, requires the challenger to show that no set of circumstances exists under which the restriction would be valid. *Id*. at 472.

[14] *State's Brief* 6. Please see footnote 6, above.

[15] Overbreadth provides not only a substantive rule—*a restriction is void if it restricts a real and substantial amount of protected speech*—but also a "departure from traditional rules of standing, permit[ting] a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute," *Alexander v. United States*, 509 U.S. 544, 555 (1993), and an exception to the usual facial-challenge rule that "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987).

scrutiny. "Not coincidentally" because substantial overbreadth is a flavor of strict scrutiny.

3. The State's substantive arguments also fail.

The state is quibbling over nomenclature, but we agree on the process: if the statute were content neutral, it would face only intermediate scrutiny, but because it is content based it is presumed to be invalid and the State must show that it meets strict scrutiny. A fair summary of the State's substantive arguments, then, is:

> the conduct at issue in this case is 1) non-communicative, meaning it is not speech at all; 2) obscene, meaning it can be proscribed based on content; or, 3) validly restricted as to manner.[16]

Where the State uses "conduct," it refers to what the statute calls "communication," which is, for First Amendment purposes, *speech*.[17]

The State's arguments are ill-founded. "Non-communicative communication" or "non-communicative speech" is a contradiction in terms. Calling the speech at issue "obscene" is question-begging.[18] And

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[16] *State's Brief* 25.

[17] *Please see* below at 3.

[18] The State also expressly disclaims section 42.07(a)(1)—which does not comply with Miller v. California's requirements for an obscenity statute—as an obscenity statute. *State's Brief* 29.

the statute is not a "manner" restriction because it is a content-based restriction. Only content-neutral restrictions can be justified as "time, place, or manner" restrictions on speech.

3.1. The alleged conduct is speech.

3.1.1. The Legislature calls it "communication."

> A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
> (1) initiates **communication** and in the course of the **communication** makes a comment, request, suggestion, or proposal that is obscene….[19]

The State says, "intentional harassment is not communication."[20] If that were true, then section 42.07(a)(1) would not apply to intentional harassment, because section 42.07(a)(1) applies *only* to communication. The State's argument that the Legislature's "communication" is not *communication* would require this Court to draw a line between *communication* that is subject to the First Amendment and "communication" that is outside the purview of the First Amendment, a distinction never made by the United States Supreme Court or any other court. The Supreme Court does not even recognize a distinction

[19] Tex. Penal Code § 42.07(a) (emphasis added).

[20] *State's Brief* 25.

between *communication* and *speech*.[21] Because the statute restricts *communication* it restricts speech. Even if *communication* in the statute did not mean *speech*, however, *comment*, *request*, *suggestion*, and *proposal* all describe different types of speech.

Section 42.07(a)(1) restricts speech, and it does so based on the content (whether it is "obscene" as defined by the statute, whether it is intended to evoke a certain emotional effect,[22] and whether it is a "comment, request, suggestion, or proposal") of the speech.

3.1.2. Communication evokes emotions.

The State writes, "Each of the types of speech appellant says are unprotected ha[s] one characteristic the conduct underlying Scott's rationale does not—the intent to communicate an idea."[23]

If the law were so simple as "conduct with no intent to convey an idea is not communication," then courts could simply say, "there is no

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[21] See, e.g., *Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech'….").

[22] A restriction based on the purpose of speech is a content-based restriction, *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015), and the *purpose* of speech is the speaker's *intent*.

[23] *State's Brief* 27.

idea communicated by pornography, so it is not communication, not speech," and state restrictions on pornography short of obscenity would face only intermediate scrutiny. [24]

What makes speech *speech* is not the time, manner, or place in which it is uttered; what makes speech *speech* is

> whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[25]

The Supreme Court in *Cohen* addressed the notion that speech must, to receive First Amendment protection, communicate *an idea*:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.[26]

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[24] To the contrary, "[s]exual expression which is indecent but not obscene is protected by the First Amendment," and restrictions thereon face strict scrutiny. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

[25] *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

[26] *Cohen v. California*, 403 U.S. 15, 26 (1971).

The thing that makes conduct *speech*, then, is the intent to convey[27] a fact or an idea, *or to evoke an emotional state*. [28] "Protected speech may communicate, among other things, ideas, emotions, or thoughts."[29]

To claim that speech is "noncommunicative" because it invokes emotions, even negative ones, in the hearer of the speech is nonsensical; one of the things that makes sounds, images, and words communicative is their purpose of calling forth an emotional state in the listener.

Some speech—a textbook, perhaps—communicates ideas and thoughts, but is not intended to invoke emotions.

Other speech—literature, for example—communicates ideas and thoughts, and also is intended to evoke emotions.

Still other speech, however, is not intended to communicate ideas or thoughts, opinions or information, but *only* to evoke emotional effects. A horror story, for example, is not intended to communicate a fact or

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[27] Provided, of course, that the likelihood was great that the message would be understood by those who received it. The State is not arguing here that speech violating section 42.07(a)(1) is not highly likely to *cause* one of the unwanted mental states. If it were, the statute would be even more overbroad.

[28] Mr. Nuncio does not pretend that this list is exclusive—communication may invoke thought (for example, *what else does a question in a footnote do?*), signal something to the recipient, or persuade.

[29] *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 448 fn.19 (2d Cir. 2001).

an idea, but to frighten—to *alarm*. Pornographic erotica are not intended to communicate a fact or an idea, but to arouse.[30] Tchaikovsky did not write his Third Symphony to communicate some idea or thought that could be reduced to words, but only to make listeners *feel*.

Horror stories and erotica and music are protected by the First Amendment not because they present "any particular topic, idea, viewpoint, or message"[31] but because[32] they are intended to evoke those effects.

It is, in other words, its communicative intent.

"Pure speech includes written and spoken words, as well as other media such as paintings, music, and film 'that predominantly serve to express thoughts, emotions, or ideas.'"[33] Or, as Justice White wrote in 1991,

> It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the

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[30] We know that the intent to arouse or gratify the emotion of sexual desire does not render speech unprotected. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013).

[31] *Cf. State's Brief* 24.

[32] And not despite.

[33] *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019).

> assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But **generating thoughts, ideas, and emotions is the essence of communication**.[34]

While this was said in dissent, it cannot be gainsaid that *generating thoughts, ideas, and emotions* is the essence of communication, and conduct that is specifically intended to generate emotions—even what we might consider unpleasant or unwelcome emotions—is by virtue of that intent speech.

Here, it is by virtue of the emotional function and purpose of Mr. Nuncio's speech that the State seeks to regulate it. The State alleges that Mr. Nuncio's "conduct" is not protected speech because of his intent to generate emotions and feelings in the complainant, which is *the very thing that makes it expressive conduct*.[35]

If a statute provided, *it is an offense to engage in repeated conduct intended to evoke joy or lust or laughter*, it would be readily recognized as

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[34] *Barnes v. Glen Theatre, Inc.*, 501 U.S 560, 592–93 (1991) (White, J., dissenting) (emphasis added).

[35] The intent to evoke one specific emotion, *the fear of unlawful violence*, may render some expressive conduct unprotected. *Virginia v. Black*, 538 U.S. 343, 360 (2003). This principle is not generalizable to all negative emotions, many of which are part of daily life in a way that fear of violence is not.

an overbroad content-based restriction on communication. Communication is no less protected because the emotion it is intended to evoke is generally perceived as negative.[36] Just as it is a normal part of human life to arouse joy and lust and laughter, it is a normal part of human life to annoy and embarrass and alarm[37] each other, and sometimes to abuse, torment, and harass each other. And just as the intent to arouse joy or lust or laughter does not render speech unprotected, neither does the intent to harass, annoy, alarm, abuse, torment, or embarrass.

3.2. This restriction is content based.

If a statute restricts speech based on its content alone—*you must not preach*—it is obviously content based.

If a statute restricts speech base only on neutral factors—*you must not make loud noise in the park at night*—it is generally content neutral, but the state's intention or application may render it content based.

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[36] "[W]hen the intent is something that, if accomplished, would constitute protected expression, such an intent cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression." *Ex parte Thompson*, 442 S.W.3d 325, 338 (Tex. Crim. App. 2014).

[37] Please see the discussion of *Bolles v. People*, below at 33

A statute that has both content-based and content-neutral elements—*you must not preach loudly in the park at night*—is content-based and subject to strict scrutiny.

The only content-neutral statutes are those that do not target speech based on its content at all.[38] A law that is content based *on its face*, as section 42.07(a)(1) is, is by definition not content neutral, and "is subject to strict scrutiny regardless of the government's … content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech[.]"[39]

3.3. A RESTRICTION CANNOT BE DEEMED CONTENT NEUTRAL ON THE BASIS OF THE GOVERNMENT INTEREST THAT IT SERVES.

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech.[40]

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[38] An analogy might be drawn to *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), in which the statute forbade only some unfavored fighting words (which are unprotected speech) and not other fighting words, also unprotected but preferred by the city.

[39] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2228.

[40] *Id*.

The State's assertion that "a regulation can be deemed content neutral on the basis of the government interest that the statute serves"[41] flies in the face of *Reed v. Town of Gilbert*, which addressed this very misunderstanding:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.[42]

The State here does the same.[43]

Contrary to the State's position, content neutrality is indeed "determined by the fact" (among others) "that a particular kind of

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[41] *State's Brief* 33.

[42] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2228. This Court did not have the benefit of *Reed* when it erroneously said in *Ex parte Thompson*, "In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content." *Ex parte Thompson*, 442 S.W.3d at 346. The State, which has the benefit of *Reed*, is intent on ignoring it.

[43] *State's Brief* 33–35.

speech is regulated." [45] That is, if a particular kind (content) of speech is regulated the regulation is not content neutral.

3.4. Content depends on the speaker's purpose.

The purpose (or *intent*) of expressive conduct, and its *content* are inextricably linked. The content of expressive conduct reveals or evokes what the actor intended to reveal or evoke. The evocative intent of the conduct is its expressive content.

A restriction based on the intent of speech is thus a restriction of the content of the speech. To say, "you may not communicate repeatedly with the intent to annoy" is expressly to limit the content of speech to that which is not annoying. It restricts different content than saying "you may not communicate repeatedly with the intent to cause joy." That it restricts certain content and not other content makes the restriction content based.

This is why, as the Supreme Court says, a restriction that defines regulated speech "by its function or purpose" is content based on its face, "and, therefore, … subject to strict scrutiny."[46]

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[45] Cf. *State's Brief* 33.

[46] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227.

3.5. This speech is protected.

The State argues that Mr. Nuncio says, "without citation or explanation," that speech does not become unprotected merely because it is intended to harass, alarm, abuse, or embarrass. But is citation or explanation necessary here?[47] How much of our ordinary day-to-day communication has the power to harass, alarm, abuse, or embarrass others? No law exists which turns high school cafeteria teasing into a penal violation; we can no more summon the police to arrest our coworker for making an annoying,[48] off-color joke than we could request that the FBI investigate embarrassing material posted on Facebook.[49] The list of categories of unprotected speech given in *U.S. v. Stevens*[50] **is an exhaustive list**; it is the sum total of every category of unprotected speech discovered by the United States Supreme Court, and contains a

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[47] Or does the presumption of invalidity require the State to prove the contrary?

[48] Speech is not unprotected because it causes public annoyance. *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

[49] That is, we could request that they do it, but they would rightly refuse, for "[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information." *New York Times Co. v. United States*, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring).

[50] *United States v. Stevens*, 559 U.S. at 468.

judicial fiat against lower courts adopting the "freewheeling authority"[51] to add to that list.

3.6. Scott's unsound rationale does not apply.

The State's argument that harassment is not communicative arises, as does so much flawed reasoning in Texas courts regarding the freedom of expression, from *Scott v. State*.[52]

Scott relied on the notion that speech which invades a privacy interest is unprotected, adopting the flawed reasoning of dicta in *Cohen v. California*. Despite that dictum in *Cohen*, however, the Supreme Court has **never** held that privacy interests render speech unprotected.[53]

Even if Scott's "intolerable invasion" rationale were sound, it would not apply in this case: section 42.07(a)(1) does not forbid *initiating communication* with the intent to annoy, embarrass, and so forth.[54] It forbids initiating communication, even legitimately and even publicly, as in Mr. Nuncio's own restaurant, and then, in the course of

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[51] *Id.* at 472.

[52] *Scott v. State,* 322 S.W.3d 662 (Tex. Crim. App. 2010).

[53] *Id.* at 668–69.

[54] Contrary to the State's suggestion at page 27 of its brief.

communication, making a comment, request, suggestion, or proposal that is obscene.

3.7. Scott is overdue for being put out to pasture.

This Court in *Scott v. State*[55] did not have the benefit of the Supreme Court's opinions in *United States v. Stevens*,[56] *United States v. Alvarez*,[57] *Brown v. Entertainment Merchants Association*,[58] or *Reed v. Town of Gilbert, Ariz.*[59]

3.8. Williams-Yulee is an aberration.

Williams-Yulee v. Florida Bar appears to say that a restriction can restrict a real and substantial amount of protected speech, and still pass strict scrutiny. But the portion of *Williams-Yulee* applying strict scrutiny to Canon 7C(1) of the Florida Code of Judicial Conduct[60]—Part II of the lead opinion—was not the voice of the Court, but only of four Justices. Justice Ginsburg did not join in the strict-scrutiny portion of the main

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[55] *Scott v. State*, 322 S.W.3d 662.

[56] *United States v. Stevens*, 559 U.S. 460.

[57] *United States v. Alvarez*, 567 U.S. 709 (2012).

[58] *Brown v. Entm't Merchants Assn.*, 564 U.S. 786 (2011).

[59] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218.

[60] Not, it should be noted, a penal statute.

opinion (she would have applied lesser scrutiny), and Justices Scalia, Thomas, Kennedy, and Alito dissented.[61]

As Justice Kennedy wrote in dissent, "the Court's opinion contradicts settled First Amendment principles."[62] But *Williams-Yulee* is not an explicit modification or rejection of the rule in *Stevens*, *Alvarez*, and *Brown*. As Justice Scalia wrote in the primary dissent, the Court "purports to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny."[63]

Williams-Yulee is a special case, a carving-out from the usual protection of the First Amendment of particular speech that judges view as bringing dishonor on their own kind:

> It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture [as in *United States v. Stevens*], protecting the innocence of children [as in *Brown v Entm't Merchants Ass'n*], and honoring valiant soldiers [as in *United States v. Alvarez*].

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[61] *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

[62] *Id.* at 1682 (Kennedy, J., dissenting).

[63] *Id.* at 1677 (Scalia, J., dissenting).

> The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.[64]

If further analysis beyond "substantially overbroad, and therefore invalid" were required here, however, the statute would still fail because the State's asserted interests are not compelling, and because the statute is not narrowly tailored.

3.9. There is no compelling state interest

The State never explains what its interest is. The state repeatedly refers to "harassment,"—

- "Intentional harassment is not communication,"
- "The statute restricts only intentional harassment that is unprotected obscenity,"
- "Legitimate communication can be done without being intentionally harassing and obscene,"

and so forth, but the statute does not forbid only speech with the intent to harass. It forbids also speech with the intent to annoy, alarm, abuse, torment, or embarrass. Even assuming arguendo that speech may be

[64] *Id.* at 1682 (Scalia, J., dissenting).

restricted because it is intended to harass,[65] *annoyance* and *embarrassment* (to choose the two proscribed emotional states that are most obviously an everyday part of life) are not states that we may be barred from causing others.

3.10. The statute does not restrict obscenity.

In arguing that section 42.07(a)(1) restricts only unprotected obscenity, the State omits from its lengthy quote[66] of *Miller v. California* the most important eight words of that opinion: *The basic guidelines for the trier of fact must be.*[67] The essential holding of Miller is *not*, as is commonly thought, that speech that satisfies what we know as the "*Miller* Test" is obscene. The essential holding of *Miller* is that an obscenity statute fails strict scrutiny if it does not leave the three elements of the "Miller Test" to the trier of fact.

Miller does not allow the State or a court to proclaim, as the State here crows, "An average person, applying contemporary community

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[65] Whatever that means—the State's repeated use of "harass" in its brief as a stand-in for the other proscribed intents in section 42.07 indicates that in the State's view, "annoying" or "embarrassing" is also harassing. Who can say otherwise? *Please see* the discussion below at 15.

[66] *State's Brief* 28.

[67] *Miller v. California*, 413 U.S. 15, 24 (1973).

standards of Texas, would find that someone who uses a patently offensive description of an excretory function or solicitation for sex to harass has a shameful interest in the subject,"[68] nor that "intentional harassment lacks serious literary, artistic, political or scientific value."[69] If the Legislature wants to write a statute that restricts speech based, even in part, on its being obscene, the Legislature will have to leave Miller's "basic guidelines" to the trier of fact.

Because section 42.07(a)(1) does not leave to the trier of fact (that is, include as elements) all of *Miller*'s basic guidelines, it cannot be constitutionally justified as a restriction on unprotected obscenity.[70]

3.11. Secondary-effects doctrine does not apply.

The State mentions secondary-effects doctrine in passing.[71]

Under that doctrine, a facially content-based zoning restriction may be justified as content neutral (and face only intermediate scrutiny) if it is aimed at the secondary effects of the speech.

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[68] *State's Brief* 29.

[69] *State's Brief* 30.

[70] The court below called section 42.07(b)(3)'s definition of "obscene" "narrower … than the *Miller* prohibition." Opinion Below at *8. It is broader, as discussed in Mr. Nuncio's opening brief at 22–23.

[71] *State's Brief* 33.

The secondary-effects doctrine is a "doctrinal anomaly."[72] It applies only to regulations of sexually oriented businesses.[73] The Supreme Court has considered applying the secondary-effects doctrine to cases not involving adult establishments, and has rejected the idea.[74]

4. States are divided on the issue.

For the false proposition, "Courts around the country agree that intentional harassment is not First Amendment speech" the State cites *U.S. v. Osinger*[79], *Gilbreath v. State*,[80] *State v. Dyson*,[81] and *State v. Thorne*.[82] None of those cases supports the State's position.

Meanwhile the high courts of Colorado, New York, Illinois, and Minnesota have all rejected criminal-harassment statutes. These states had criminal harassment statutes that required the same intent as the

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[72] Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 Santa Clara L.R. 385, 390 (2017).

[73] *Id.* at 386.

[74] *Boos v. Barry*, 485 U.S. 312, 320–21 (1988) (plurality); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1992); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 867 (1997).

[79] *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014)

[80] *Gilbreath v. State*, 650 So. 2d 10, 12 (Fla. 1995).

[81] *State v. Dyson*, 872 P.2d 1115, 1119 (Wash. Ct. App. 1994).

[82] *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va. 1985).

Texas statute and prohibited the same actions as section 42.07.[83] The high court of each state held that the statute before it was unconstitutionally overbroad because it would sweep in a substantial amount of protected speech relative to unprotected speech or conduct.[84]

A number of state intermediate courts of appeals have also struck statutes similar to section 42.07 as unconstitutionally overbroad.[85]

4.1. *United States v. Osinger*

The federal statute in *United States v. Osinger*, and the federal statute, unlike section 42.07(a)(1),

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[83] *See* COLO. REV. STAT. § 18-9-111(1)(e) (1973); N.Y. PENAL LAW § 240.30 (2012); 38 Ill. Comp. Stat. § 26-1(a)(2) (1973); Minn. Stat. § 609.749, subd. 2(6) (2018).

[84] *See People v. Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014); *Bolles v. People*, 541 P.2d 80, 83-84 (Colo. 1975); *People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977); *Matter of Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019)

[85] *See, e.g.*, *Provo City v. Whatcott*, 1 P.3d 1113, 1115-16 (Utah Ct. App. 2000) (holding unconstitutional a statute that prohibited making phone calls "with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten"); *City of Everett v. Moore*, 683 P.2d 617, 618, 620 (Wash. Ct. App. 1984) (holding unconstitutional a municipal statute that prohibited communications "by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm" when made "with intent to harass, annoy or alarm another person"); *State v. Dronso*, 279 N.W.2d 710, 711 n.1, 714 (Wis. Ct. App. 1979) (holding unconstitutional a statute that prohibited making a telephone call with "intent to annoy another").

- prohibits a "course of conduct," not speech;
- does not favor one form of expressive conduct over another;
- requires that a victim be placed in fear of physical injury, or suffer or reasonably be expected to suffer "substantial emotional distress." [86]

The statute is not analogous to section 42.07(a)(1).

4.2. Florida: Gilbreath v. State

The Florida court "narrowed the statute's scope by limiting it to telephone calls in which the caller possesses an intent to abuse, threaten or harass,"[87] rewriting the statute to excise "offend" and "annoy."[88] This court may not "assume the legislative prerogative and rewrite a statute in order to save it."[89] Even if it could, *annoy* and *embarrass* are not the only two listed evocations of unpleasant emotions that are constitutionally protected—they are *all* protected, unless they fall into some recognized exception.[90]

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[86] 18 U.S.C. § 2261A(2)(A).

[87] *Gilbreath v. State*, 650 So. 2d 10, 11 (Fla. 1995).

[88] *See id.* at 11 (quoting full language of statute).

[89] *Olvera v. State*, 806 S.W.2d 546, 552 (Tex. Crim. App. 1991).

[90] Even *alarm*—sometimes we need to alarm each other into required action (for example, repeated storm warnings to a community that should evacuate)—or *threaten*—threats do not become unprotected until they rise to the level of "true threats." *Virginia v. Black*, 538 U.S. 343.

The Florida statute requires that a call be made "to a location at which the person receiving the call has a reasonable expectation of privacy,"[92] and section 42.07(a)(1) has no such requirement: a communication made in public (or in the defendant's own restaurant[93]) can violate section 42.07(a)(1).

These two factors, absent from section 42.07(a)(1), were key to the Florida court's approval of the statute: "it is the conduct of intentionally making *such* a call into *a place of expected privacy*, not pure speech, which is proscribed."[94]

4.3. Washington: State v. Dyson

The Washington statute in *State v. Dyson* likewise required a telephone call, rather than the public communications at issue here. While the Washington court, like the Florida court, is wrong about communications losing protection because they are made over private channels, that consideration is not even at play in this case.

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[92] *Gilbreath v. State*, 650 So. 2d at 11.

[93] CR 122.

[94] *Gilbreath v. State*, 650 So. 2d at 12 (emphasis added).

4.4. West Virginia: State v. Thorne

The West Virginia case of *State v. Thorne*[95] also hinged on the fact that the statute dealt only with telephone harassment, and not with face-to-face communications.[96]

4.5. Colorado: Bolles v. People

The Colorado statute at issue in *Bolles v. People* stated that a person "commits harassment if, with intent to harass, annoy, or alarm another person, he: … (e) Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of communication, in a manner likely to harass or cause alarm."[97] The Colorado Supreme Court examined the definitions of "annoy" and "alarm" and concluded that, under the statute, "one is guilty of the crime of harassment if he intends to 'alarm' another person—arouse to a sense of danger—and communicates to that other person in a manner likely to cause alarm."[98] Under such a statute, the court concluded, it

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[95] *State v. Thorne*, 333 S.E.2d at 819.

[96] *See id.* ("If people were allowed to make repeated calls for the sole purpose of harassing government employees, this would tie up the phone for those who wish to reach their government on legitimate business.")

[97] Colo. Rev. Stat. § 18-9-111(1)(e) (1973).

[98] *Bolles v. People*, 541 P.2d at 83.

would "be criminal in Colorado to forecast a storm, predict political trends, warn against illnesses, or discuss anything that is of any significance."[99] The statute thus swept in a substantial amount of protected speech.[100]

The Colorado court rejected *Scott*'s notion that harassment statutes are permissible when "directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another's privacy and do so in a manner reasonably likely to inflict emotional distress."[101] Declining to exalt this type of privacy interest over freedom of speech, the Colorado court stated, "we cannot, in the face of the pronouncement of the First Amendment which specifically protects the right to communicate, expand the parameters of the penumbral right to privacy, so as to prohibit communication of ideas by mail when the sender has not been requested to refrain from doing so."[102] The court concluded that, "if unsettling, disturbing,

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[99] *Id.*

[100] *See id.* at 83-84.

[101] *Scott v. State*, 322 S.W.3d at 669-70; *see Bolles v. People*, 541 P.2d at 83-84.

[102] *Bolles v. People*, 541 P.2d at 83. Although the Colorado statute invalidated in *Bolles* did not require "repeated" communications, as does section 42.07(a)(4), and the court recognized the possibility that privacy of the home, "under some circumstances, is a

arousing, or annoying communications could be proscribed, or if they could only be conveyed in a manner that would not alarm, the protection of the First Amendment would be a mere shadow indeed."[103]

The Supreme Court of Colorado noted, "the crucial factor is that this statute could also be used to prosecute for communications that cannot be constitutionally proscribed."[104]

4.6. New York: People v. Golb

New York's highest court had similar concerns about that state's criminal harassment statute, which applied when a person "with intent to harass, annoy, threaten or alarm another person,… communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm."[105] That court determined that this language covered substantial amounts

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legitimate legislative concern," 541 P.2d at 83, the Colorado court made clear that those limited circumstances would need to turn on conduct and not communication of an annoying or alarming message. *See id.* at 83-84 (providing examples of a commercial solicitor appearing in person at one's door or "the merciless blare" of a soundtruck).

[103] *Id.* at 83.

[104] *Id. at* 80.

[105] N.Y. PENAL LAW § 240.30(1)(a) (2012).

of protected speech.[106] Indeed, "'no fair reading' of this statute's 'unqualified terms supports or even suggests the constitutionally necessary limitations on its scope.'"[107]

The New York court's opinion, like that of the Colorado court in *Bolles*, did not depend on the fact that the statute included forms of communication other than telephonic. The reasoning of those two cases applies equally to telephonic communication, email, and postal mail.

4.7. Illinois: People v. Klick

Although Illinois's harassment statute[108] did not use words identical to those in Texas Penal Code section 42.07, the Illinois Supreme Court determined that the statute would cover the same speech criminalized by the Texas, Colorado, and New York statutes: speech intended to annoy the recipient that does not fall into any accepted category of unprotected speech (such as true threats or obscenity[109]).[110]

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[106] *People v. Golb*, 15 N.E.3d at 813-14.

[107] *People v. Golb*, 15 N.E.3d at 813.

[108] 38 Ill. Comp. Stat. § 26-1(a)(2) (1973)

[109] Section 42.07(a)(1) is not restricted to obscenity either. *Please see* above at 24.

[110] *See People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977).

The Illinois statute provided that it was an offense to "knowingly … [w]ith intent to annoy another, make[] a telephone call, whether or not conversation thereby ensues."[111] The court concluded that the statute was unconstitutionally overbroad, observing that "First Amendment protection is not limited to amiable communications."[113]

Like the Colorado court in *Bolles*, the Illinois court considered the argument that "one's right to communicate must be balanced against another's right to privacy in his home."[114] It rejected the argument on two grounds. First, the statute was not limited to phone calls made to a home.[115] Second, the statute was "not limited to only conduct which

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[111] 38 Ill. Comp. Stat. § 26-1(a)(2) (1973).

[113] *Id.* at 332. The Illinois Supreme Court upheld a later version of the statute enacted in response to *Klick* that removed "annoy" from the list of possible intents for making a telephone call. *See People v. Parkins*, 396 N.E.2d 22, 23-24 (Ill. 1979) (considering revised language criminalizing "[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number"), *appeal dismissed*, 446 U.S. 901 (1980). The court stated that, as amended, "the words 'abuse' and 'harass' take color from the word 'threaten' and acquire more restricted meanings"; therefore, the statute was not overbroad. *Id.* at 24.

[114] *People v. Klick*, 362 N.E.2d at 332; *see also Bolles v. People*, 541 P.2d at 83-84.

[115] People v. *Klick*, 362 N.E.2d at 332.

might be deemed 'intolerable.'"[116] Both of these grounds also apply to Texas Penal Code section 42.07(a)(1).

4.8. Minnesota: Matter of Welfare of A.J.B.

In a July 2019 opinion, the Minnesota Supreme Court considered and rejected conduct-centric arguments like those urged by the State here.[117]

Although Minnesota's statute was expressly framed in terms of conduct and arguably covered less protected speech than section 42.07(a)(1),[118] the court nonetheless held it unconstitutionally overbroad.[119]

Although the stalking-by-mail statute explicitly addressed "conduct," that conduct was "tethered closely" to expression.[121]

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[116] *Id.* "The legislature cannot abridge one's first amendment freedoms merely to avoid slight annoyances caused to others." *Id.*

[117] *Matter of Welfare of A.J.B.*, 929 N.W.2d 840 at 852, 859 (Minn. 2019.

[118] See *Id.* at 849 (containing language of statute). The Minnesota statute's mens rea requirement differs slightly from section 42.07(a)(1)'s, allowing a conviction when the actor "has reason to know" of the specified harm (whereas Texas requires intent), but also requiring actual harm (which Texas does not require). Regardless, the court held that Minnesota's statute would be unconstitutionally overbroad even if it required actual knowledge that the specified harm would ensue. *Id.* at 857.

[119] *See id.* at 857.

[121] *Matter of Welfare of A.J.B.*, 929 N.W.2d at 851. Cf. *State's Brief* at 30 (characterizing *communication* as *conduct*).

5. Section 42.07(a)(1) is void for vagueness.

The State argues, "Unlike a potentially vague requirement that the conduct "harass, annoy, alarm, abuse, torment, or embarrass another," the focus is on the actor's intent."[122]

This argument is facially appealing—*of course* the speaker knows whether he has the requisite specific intent.

But it falls apart under scrutiny. We are talking about communication, and the chilling of communication. Communication is chilled not only by the threat of *conviction* (because a jury might find that the defendant intended to harass, annoy, alarm, abuse, torment, or embarrass) but also by the threat of *arrest* (because a police officer might think the defendant intended to harass, annoy, alarm, abuse, torment, or embarrass) and the threat of prosecution (because a prosecutor might think the defendant intended to harass, annoy, alarm, abuse, torment, or embarrass). Even assuming that a jury can reliably read a speaker's mind, whether a speaker will be arrested or prosecuted for his speech depends not on a jury's mindreading, but on a police officer's and a prosecutor's.

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[122] *State's Brief* 36.

A chilling effect on speech exists where persons of reasonable judgment cannot determine whether their speech will be perceived as intended to annoy, alarm, abuse, harass, torment, or embarrass. To leave such a decision to law enforcement runs afoul of the rule of *Grayned* that it is impermissible to delegate basic policy matters to "policemen, judges, and juries for resolution on an ad hoc or subjective basis."[125]

The crux of the challenge is not, as the State suggests,[126] that there are "close cases." It is that the decision point for close cases rests not with the trier of fact but with the constable charged with enforcing the law.

People are messy. We are socially awkward. Sometimes we embarrass or annoy others without meaning to. Often our intentions are misinterpreted. "No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience."[127] No speaker can know how the different members of an audience will interpret the intent (*meaning*) of his speech.

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[125] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

[126] *State's Brief* 12–13

[127] *Thomas v. Collins*, 323 U.S. 516, 534 (1945).

How is a speaker to know how the police or prosecutors or courts will *interpret* the intent of his language? They cannot, after all, read his mind. And as the State's repeated description of the intent element of the statute as "to harass" shows, the State considers *harass* to include *annoy*, *alarm*, *abuse*, *torment*, and *embarrass*.

A restriction criminalizing speech based on the speaker's intent "offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[128]

The person who doesn't *intend* to annoy has no way to know that his words won't be misinterpreted.

> In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of … **whatever inference may be drawn as to his intent and meaning**.[129]

Likewise,

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[128] *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

[129] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (emphasis added).

> Any effort to distinguish between [discussion and advocacy] based on intent of the speaker or effect of the speech on the listener would … would offer no security for free discussion….[130]

The unconstitutional vagueness of section 42.07(a)(1) may be best illustrated by the *Complaint* in this case.[131]

There is no indication in the *Complaint* that the complainant objected to Mr. Nuncio's communications at the time. There is nothing to show that Mr. Nuncio intended to harass, annoy, alarm, abuse, torment, or embarrass the complainant or anyone else. While Mr. Nuncio's words may have been crass, , there is nothing about them that makes a proscribed intent obvious.

It is doubtful that Mr. Nuncio could have raised an as-applied challenge to the statute. But when he says that the statute is vague, he means that the statute is vague *even as to him*. Mr. Nuncio had no way of knowing that his speech would be interpreted by the constabulary as intended to harass, annoy, alarm, abuse, torment, or embarrass the complainant.

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[130] *Fed. Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 495 (2007) (internal edits and quotation marks omitted).

[131] Clerk's Record 122.

6. Conclusion

The State's arguments all fail. This Court should reverse the judgment of the Court of Appeals, and remand with orders that the *Information* be dismissed.

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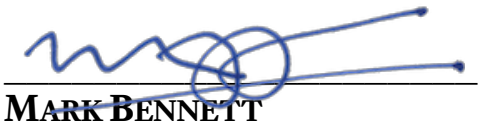

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing brief was served on all parties and counsel of record as required by the Texas Rules of Appellate Procedure on the same date as the original was electronically filed with the Clerk of this Court.

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